

SUPREME COURT OF ARKANSAS

No.

Opinion Delivered 1-8-09

IN RE: RULES OF CRIMINAL
PROCEDURE, RULES 24.3(b)
AND 28.1; ADMINISTRATIVE
ORDER NUMBER 4

PER CURIAM

The Supreme Court Committee on Criminal Practice has submitted several proposals to the court as set out in detail below. We express our gratitude to the members of the Criminal Practice Committee for their work. These proposals are being published for comment, and the comment period shall end on April 1, 2009. (New language is underlined in the rules set out below.)

Comments should be submitted in writing to: Clerk of the Arkansas Supreme Court, Attention: Criminal Practice Committee, Justice Building, 625 Marshall Street, Little Rock, AR 72201.

1. Amendments to Arkansas Rule of Criminal Procedure 28.1 and Arkansas Rule of Criminal Procedure 24.3(b) to clarify defendant's right to review when speedy trial motion is denied by trial court.

A. The Committee recommends the following changes to Rule 28.1 (consult the accompanying Reporter's Note for explanation of changes):

Rule 28.1. Limitations and consequences.

(a) Any defendant charged with an offense ~~in circuit court~~ and incarcerated in a city or county jail in this state pending trial shall be released on his own recognizance if not brought to trial within nine (9) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

(b) Any defendant charged with an offense ~~in circuit court~~ and incarcerated in prison in this state pursuant to conviction of another offense shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

(c) Any defendant charged ~~after October 1, 1987, in circuit court~~ with an offense and held to bail, or otherwise lawfully set at liberty, including released from incarceration pursuant to subsection (a) hereof, shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

(d) ~~Motion for dismissal of a charge pursuant to subsection (b) or (c) hereof shall be made to the trial court, but if denied, may be presented to the Arkansas Supreme Court by petition for writ of prohibition. Any defendant who is charged with an offense in circuit court, including a defendant who appeals a district court conviction to circuit court, and who is entitled to a dismissal of the charge because not brought to trial in the circuit court as provided in subsection (b) or (c) hereof may move the circuit court for dismissal of the charge. If the circuit court denies the motion to dismiss, the defendant may raise the denial in a post-trial appeal of a conviction as grounds for reversing the conviction and dismissing the charge. The defendant whose motion is denied by the circuit court shall not be entitled to seek interlocutory review of the denial by appeal or by petition for writ of prohibition, but the defendant may, in appropriate cases, seek interlocutory review by petition for writ of certiorari. The failure of a defendant to seek interlocutory review by petition for writ of certiorari shall not constitute a waiver of the defendant's right to raise the denial of rights under subsection (b) or (c) hereof in a post-trial appeal.~~

(e) Any defendant charged with an offense in district court who is entitled to dismissal of the charge because not brought to trial in the district court as provided in subsection (b) or (c) may move the district court for dismissal of the charge. If the district court denies the motion for dismissal, there shall be no right to interlocutory review of the denial, but the defendant who appeals a district court conviction to the circuit court may move the circuit court for dismissal of the charge because not brought to trial in the district court as provided in subsection (b) or (c) hereof. If the circuit court denies the motion for dismissal, there shall be no right to interlocutory review of the denial except by writ of certiorari as provided in subsection (d) hereof, but the defendant

who appeals a conviction in the circuit court may raise the denial as grounds for reversing the conviction and dismissing a charge.

~~(e)~~ (f) The dismissal of a charge pursuant to subsection (b) or (c) hereof shall also be an absolute bar to prosecution for any other offense required to be joined with the charge dismissed.

~~(f)~~ (g) (1) If the district court denies a defendant's motion to dismiss because not brought to trial in the district court as provided in subsection (b) and (c) hereof, the defendant may thereafter enter a plea of guilty in district court without waiving the right to move the circuit court for dismissal of the charge because the defendant was not brought to trial in the district court as provided in subsection (b) or (c) hereof.

(2) If the circuit court denies a defendant's motion to dismiss because not brought to trial in either the circuit court or the district court as provided in subsection (b) or (c) hereof, the defendant may enter a conditional plea of guilty in the circuit court as provided in Rule 24.3(b).

(3) Failure of a defendant to move for dismissal of a charge pursuant to subsection (b) or (c) hereof prior to a plea of guilty or trial shall constitute a waiver of his rights under ~~these rules~~ this rule.

~~(g)~~ (h) This rule shall have no effect in those cases which are expressly governed by the "Interstate Agreement on Detainers Act" (Act 705 of 1971).

Reporter's Notes to 2009 Amendments

The 2009 amendments deleted references to the "circuit court" in subsections (a), (b), and (c) of this rule. The Supreme Court had previously held that the speedy trial requirements of the rule applied to a proceeding in municipal court, the predecessor of the district court. Stephens v. State, 295 Ark. 541, 750 S.W.2d 52 (1988); Whittle v. Washington County Circuit Court, 325 Ark. 136, 925 S.W.2d 383 (1996).

Prior to the change, a defendant whose speedy trial motion was denied by the circuit court could seek interlocutory Supreme Court review of the decision by filing a writ of prohibition. See former Rule 28.1(d). Similarly, the defendant in district court could file petition for writ of prohibition in the circuit court, and if the circuit court also denied the speedy trial motion, the defendant could seek Supreme Court review by writ of prohibition. Cf. Prine v. State, 370 Ark. 232, 258 S.W.3d 347 (2007); McFarland v. Lindsey, 338 Ark. 588, 2 S.W.3d 48 (1999). As a result of such interlocutory

review, a rule designed to encourage prompt disposition of criminal cases often resulted in lengthy delays in the trial of such cases.

The 2009 amendments substantially limited the defendant's right to seek interlocutory review of an adverse ruling on a speedy trial motion. Subsection (e) makes it clear that there is no right to interlocutory review of a district court's denial of a speedy trial motion. Under revised subsection (d), a circuit court's denial of a speedy trial motion is not reviewable prior to trial except by writ of certiorari.

It is anticipated that a writ of certiorari will be issued to a circuit court only in extraordinary cases where the record clearly demonstrates that the circuit court has grossly abused its discretion by denying the defendant's speedy trial motion. The standards for determining the propriety of a writ of certiorari are set out in numerous recent Supreme Court opinions:

- 1. A writ of certiorari is extraordinary relief.*
- 2. The appellate court will not look beyond the face of the record to ascertain the actual merits of a controversy, or to control discretion, or to review a finding of fact, or to reverse a trial court's discretionary authority.*
- 3. A writ of certiorari lies only where it is apparent on the face of the record that there has been a plain, manifest, clear, and gross abuse of discretion, or that there is a lack of jurisdiction, an act in excess of jurisdiction on the face of the record, or the proceedings are erroneous on the face of the record.*
- 4. Certiorari is available in the exercise of the Supreme Court's review of a tribunal which is proceeding illegally where no other mode of review has been provided.*
- 5. There can be no other adequate remedy but for the writ of certiorari.*

See Evans v. Blankenship, 374 Ark. 104, ___ S.W.3d ___ (2008); Helana-West Helena School Dist. #2 of Phillips County v. Phillips County Circuit Court, 368 Ark. 549, 247 S.W.3d 823 (2007); Arkansas Game & Fish Comm'n v. Herndon, 365 Ark. 180, 226 S.W.3d 776 (2006); Ark. Department of Human Services v. Collier, 351 Ark. 506, 95 S.W.3d 772 (2003)(writ of certiorari granted when trial court made a decision that was contrary to the plain language of a statute); Cooper Communities, Inc. v. Benton County Circuit Court, 336 Ark. 136, 984 S.W.2d 429 (1999); and Oliver v. Pulaski County Circuit Court, 340 Ark. 681, 13 S.W.3d 156 (2000).

Prior to the 2009 amendments a guilty plea waived the defendant's right to raise an alleged denial of speedy trial. Revised subsection (g)(1) makes it clear that a defendant whose speedy trial motion is denied by the district court may thereafter plead guilty in the district court, file an appeal with the circuit court, and renew the speedy trial motion in the circuit court. A similar procedure does not apply in circuit court, but revised subsection (g)(2) does permit the defendant whose speedy trial motion is denied by the circuit court to enter a conditional plea of guilty and still appeal the speedy trial issue to an appellate court provided the requirements of Rule 24.3(b) are otherwise satisfied.

B. The Committee also recommends that, if proposed subsection (g)(2) of Rule 28.1 is adopted, the following conforming amendment should be made to Arkansas Rule of Criminal Procedure 24.3(b) and the conditional plea form:

Rule 24.3. Pleading by defendant.

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(b) With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress seized evidence or a custodial statement or a pretrial motion to dismiss a charge because not brought to trial within the time provided in Rule 28.1 (b) or (c). If the defendant prevails on appeal, the defendant shall be allowed to withdraw the conditional plea.

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Reporter's Notes to 2009 Amendments

The 2009 change permitted a defendant to enter a conditional plea of guilty following the court's denial of a motion to dismiss due to a violation of the defendant's right to speedy trial as provided in Rule 28.1.

2. Amendment to Administrative Order No. 4 regarding verbatim record of court communications with jurors

The Committee recommends amending Administrative Order Number 4 to address ex parte conversation between a circuit judge and a juror. See *Barritt v. State*, 372 Ark. 395, ___ S.W.3d ___ (Feb. 21, 2008). Administrative Order No. 4 would be amended as follows:

Order 4. Verbatim Trial Record

(a) Verbatim Record. Unless waived on the record by the parties, it shall be the duty of any circuit court to require that a verbatim record be made of all proceedings, including any communications between the court and one or more members of the jury, pertaining to any contested matter before it the court or the jury.

(b) Back-up System. When making a verbatim record, an official court reporter or substitute court reporter shall always utilize a back-up system in addition to his or her primary reporting system in order to insure preservation of the record.

(c) Exhibits. Physical exhibits received or proffered in evidence shall be stored pursuant to the requirements of Section 21 of the Regulations of the Board of Certified Court Reporter Examiners, Official Court Reporter Retention Schedule.

(d) Sanctions. Any person who fails to comply with these requirements shall be subject to the discipline provisions of the Rules and Regulations of the Board of Certified Court Reporter Examiners in addition to the enforcement powers of the court, including contempt.